

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSEPH DERRICK TYRPIN,

Defendant-Appellee.

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UNPUBLISHED

April 15, 2003

No. 243603

Oakland Circuit Court

LC No. 01-180118-FH

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

The prosecution appeals as of right defendant's jury trial convictions of third-degree criminal sexual conduct (CSC), MCL 750.520d, and fourth-degree CSC, MCL 750.520e. Defendant was sentenced to one year in jail for the third-degree CSC conviction, and two years' probation with the first year spent in jail for the fourth-degree CSC conviction, to be served concurrently. We affirm defendant's convictions, vacate his third-degree CSC sentence, and remand for resentencing.

The prosecution argues that defendant's sentence of one year in jail for the third-degree CSC conviction is an invalid sentence under the indeterminate sentencing act. We agree. MCL 769.8(1), provides:

When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence.

Defendant was convicted under the third-degree CSC statute, which provides that CSC "in the third degree is a felony punishable by imprisonment for not more than 15 years." MCL 750.520d(2). This was defendant's first felony conviction. Under the indeterminate sentence act, MCL 769.8, 769.9, defendant must be sentenced on an indeterminate basis, with the sentencing judge setting both the minimum and maximum terms of imprisonment. See *People v Austin*, 191 Mich App 468, 469; 478 NW2d 708 (1991); see, also, *People v Kelly*, 186 Mich App 524, 529; 465 NW2d 569 (1990). Here, the trial court did not set minimum and maximum terms

of imprisonment but, instead, rendered a definite one-year jail term in violation of the indeterminate sentencing act; therefore, resentencing is required.

Defendant's reliance on *People v Lyles*, 76 Mich App 688, 690; 257 NW2d 220 (1977), for the proposition that a one-year jail sentence for an offense potentially punishable by imprisonment is not subject to the indeterminate sentencing act, is misplaced. In that case, the defendant pleaded guilty to attempted carrying a concealed weapon, MCL 750.92, 750.227. MCL 750.227(3) provided for a sentence of imprisonment for not more than five years and MCL 750.92(2) provided that conviction for an attempt to commit such an offense was "punishable by imprisonment in the state prison not more than five [5] years or in the county jail not more than one [1] year." Consequently, the one-year jail sentence rendered in *Lyles* was specifically statutorily authorized, a fact not present in this case.

Next, the prosecution argues that the trial court erred when it failed to score ten points for offense variable (OV) 4, serious psychological injury requiring professional treatment. MCL 777.34(a). We disagree. A trial court's scoring decision will be upheld on appeal if there is any supporting evidence in the record. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Ten points may be scored under OV 4 if a victim, because of the offense, has a "serious psychological injury [that] may require professional treatment." MCL 777.34(2) (emphasis added). The prosecutor must prove the accuracy of challenged information by a preponderance of the evidence. *People v Ewing (After Remand)*, 435 Mich 443, 450 (Brickley, J.), 473 (Boyle, J.); 458 NW2d 880 (1990).

Here, there was evidence in the record to support the trial court's scoring decision that "[n]o serious psychological injury requiring professional treatment occurred to a victim" because of the offense. MCL 777.34(1)(b). Defendant presented evidence that the victim's grades improved after the offense. This evidence, though marginally relevant, casts doubt on the existence of a serious psychological injury. Defendant also presented a letter from a longtime acquaintance of the victim indicating that the victim had not been psychologically harmed by the attack. Moreover, in response to the trial court's request to present evidence of the victim's psychological history, the prosecution only presented a letter from the victim's counselor that failed to include the victim's psychological history. In sum, because there is supporting evidence in the record, the trial court's decision must be upheld. See *Hornsby*, *supra*.

Next, the prosecution argues that the trial court improperly considered defendant's alleged remorse as a substantial and compelling reason to depart from the legislative sentencing guidelines' range. We agree and, since defendant concedes this point, further review is unnecessary. See *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000); *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000).

Finally, the prosecution argues that the trial court abused its discretion when it departed from the sentencing guidelines' range recommended for third-degree CSC. We agree. In reviewing a departure from the guidelines' range, the existence of a particular factor is a factual determination subject to review for clear error; whether the factor is objective and verifiable is reviewed as a matter of law, and that the factor constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id.*

Here, because the offenses were committed after January 1, 1999, the legislative sentencing guidelines apply and, in most instances, a court must impose a sentence in accordance with the appropriate sentence range. MCL 769.34(1) and (2); *Babcock, supra* at 72. Pursuant to MCL 777.16y, third-degree CSC is a class B felony with a statutory maximum of fifteen years' imprisonment. Defendant's prior record variable score (PRV) was 10 points, placing him in PRV level C, and the offense variable (OV) score was zero, placing him in OV level I; therefore, the minimum sentence range, pursuant to MCL 777.63, was 24 to 40 months. However, the trial court imposed a one-year jail term on the ground that substantial and compelling reasons existed justifying departure. See MCL 769.34(3); *People v Fields*, 448 Mich 58, 68-69, 70; 528 NW2d 176 (1995); *Babcock, supra*.

The trial court held that the following factors—defendant's remorse, admission of responsibility, cooperation with police, minimal criminal record, good employment record, likelihood of rehabilitation, and the victim's questionable credibility—constituted sufficient reasons for a downward departure from the recommended guidelines' range. However, as previously discussed, defendant's alleged remorse was not an appropriate factor; defendant's alleged "cooperation with police" consisted of his apparent admission of responsibility—which did not assist police in fighting crime as contemplated in *Fields, supra* at 77 as a substantial and compelling factor; defendant's prior criminal record was considered in determining the appropriate sentence range, MCL 777.21(1)(b); and defendant's likelihood of rehabilitation and the trial court's assessment of the victim's credibility are not objective and verifiable. Therefore, the trial court improperly relied on these inappropriate factors.

The only objective and verifiable factor that the trial court relied on to support its departure decision was defendant's employment record. The prosecution argues that defendant's employment record alone does not present a substantial and compelling reason to depart from the recommended guidelines' range. We agree. "[R]easons justifying departure should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *Fields, supra* at 67. "[T]he words 'substantial and compelling' constitute strong language. The Legislature did not wish that trial judges be able to deviate from the statutory minimum sentences for any reason." *Id.*

Defendant, who was twenty-six at the time of the offense, had worked steadily in the food industry since he was fourteen or fifteen years old. His employer indicated that he was an above-average employee. While defendant's employment record is applaudable, it does not 'keenly' or 'irresistibly' grab our attention such as to constitute a substantial and compelling reason to depart from the recommended guidelines' range. See *id.* Therefore, the trial court abused its discretion when it rendered a sentence that departed from the applicable guidelines' range.

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Mark J. Cavanagh  
/s/ Jessica R. Cooper